Supreme Court

97 . 2 5 0 AUG 7 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

HAROLD ALVIN SCHILDT,

Petitioner,

vs.

HARRY SOUVAL, 8th District Prosecutor; FEDERAL BUREAU OF INVESTIGATION; ROBERT M. CARLSON, FBI; JOHN LAURSEN, Uintah County Sheriff Deputy; UINTAH COUNTY SHERIFF'S DEPARTMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL A. STANTON
Counsel of Record
Attorney for Petitioner
352 South Denver Street, #226
Salt Lake City, Utah 84111
(801) 328-8230

71735 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

48 pp

QUESTIONS PRESENTED

I. Where the United States District Court acted prematurely and erroneously when it entered its judgment of dismissal precluded any opportunity, by subsequent proof to establish a claim under Title 42 U.S.C. § 1983 that allows a state official to be held personally liable for damages based upon actions taken in his official capacity.

II. When a state official violates a rule of law that would prevent prosecution and prosecutes, does his actions fall within the scope of his immunity.

III. Whether the plaintiff must be specific in his pleadings that he is suing the defendants in a personal capacity or a professional capacity.

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appears in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. Where The United States District Court Acted Prematurely And Erroneously When It Entered Its Judgment Of Dismissal Precluded Any Opportunity, By Subsequent Proof, to Establish A Claim Under Title 42 U.S.C. § 1983 That Allows A State Official To Be Held Personally Liable For Damages Based Upon Actions Taken In His Official Capacity.	7
II. When A State Official Violates A Rule Of Law That Would Prevent Prosecution And Prosecutes, Does His Action Fall Within The Scope Of His Immunity.	13

Contents

Page

III. Whether The Plaintiff Must Be Specific In His Pleadings That He Is Suing The Defendants In A Personal Capacity Or A Professional Capacity. 14

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Austin v. Borel, 830 F.2d 1356 (C.A. 5 (LA) 1987) ... 9, 13

Benavides v. Gunnall, 722 F.2d 615 (1983) 9, 13

Burns v. Reed, No. 89-1715 (1991) 9, 13

Gibson v. Rich, 44 F.3d 274 (C.A. 5 (Tex.) 1995) 10

Hafer v. Melo, et al., No. 96-681 (1991) 6, 10, 11, 14

Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) 5, 9, 13

Scheuer v. Rhodes, 416 U.S. 232 (1974) 10

Wisden v. City of Salina, 696 P.2d 1205 (Utah 1985) .. 6, 8

Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 882, 43 L. Ed. 2d 214 (1975) 11

Contents

Page

Statutes Cited:

18 U.S.C. § 1073 ..... 4, 12

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... i, 1, 5, 6, 7, 10, 11, 13

Utah Code Annotated 76-5-503 12

Rule Cited:

Tenth Circuit Rule 36.3 1

APPENDIX

Appendix A — Order and Judgment of the United States Court of Appeals for the Tenth Circuit Filed May 9, 1997 ..... 1a

Appendix B — Order of the United States District Court for the Central Division, District of Utah Filed August 15, 1996 ..... 11a

Appendix C — Order of the United States District Court for the District of Utah, Central Division Dated May 8, 1996 ..... 13a

Appendix D — Order of the United States District Court for the District of Utah, Central Division Dated February 6, 1995 ..... 16a

Contents

Page

Appendix E — Order of the United States District Court for the District of Utah, Central Division Filed September 21, 1994 ..... 19a

Appendix F — Statutes and Rules Involved 22a

Petitioner, Harold Alvin Schildt, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not a binding precedent except under the doctrines of law of the cases, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders and judgment; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 9, 1997. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. . . .

STATEMENT OF THE CASE

On November 3, 1992, Harold Schildt was given temporary physical custody of his minor child, Sammi Arlean Schildt, by the Eighth Judicial District Court, State of Utah, the Honorable, A.L. Payne presiding, Case No. 91080031DA.[1]

Harold Schildt was unable to obtain the physical custody of the child until December 3, 1992, when Trenna Schildt was arrested on a warrant for custodial interference.

On December 6, 1992, Harold Schildt, without notice, received a telephone call from his mother stating the court called and he was ordered to appear before the court on December 7, 1992.

Harold Schildt appeared before the court at the appointed time, without his attorney. His attorney was out of state and could not be reached. Treena Schildt appeared before the court. Uintah County Attorney Harry Souvall appeared before the court.

Harold Schildt was told by the court that a hearing, on Treena Schildt's arrest of December 3, 1992, had been held on December 4, 1992 without his presence. Although his attorney had been present. Harold Schildt had not been aware of this hearing nor had he been contacted by his attorney of this hearing nor had he been given any notice of this hearing.

The court informed Harold Schildt that the court had modified the temporary physical custody order of November 3, 1992 on December 4, 1992, restricting Harold from taking the minor child out of the state and ordering supervised visitation for Treena Schildt with the minor child. The court had ordered

---

1. *Harold Alvin Schildt v. Treena Pauline Schildt.*

Harry Souvall, on December 4, 1992, to prepare the modified order for the court's signature and entry by the clerk, but the order had not been prepared as of this date. Nor did Harry Souvall or anyone else thereafter reduce the order to writing for signature and entry.

The court ordered Harold to immediately go that day to Social Services and arrange for supervised visitation for Treena Schildt. The December 7, 1992 hearing was concluded without the court assigning anyone to reduce the orders of that hearing to written form for signing and entry.

Harold Schildt on that day went to Social Services as ordered by the court. Social Services told Harold Schildt they could not arrange supervised visitation for Treena Schildt without a formal written order from the court. Harold tried for a week to obtain the written order through his attorney's office and from Harry Souvall's office. Harold explained the written order was required or Social Services would not arrange supervised visitation. Harold Schildt was able to obtain Harry Souvall's home telephone number and called him there explaining the requirement of the written order by Social Services. Harry Souvall told Harold Schildt not to worry about visitation. Neither the December 4, or December 7, 1992 hearings were ever reduced to written order, signed by the court and entered into the record. Harry Souvall was assigned by the court to reduce the December 4, 1992 hearing to a written order for the courts signature.

At the time of the December 4 and December 7, 1992 hearings the court was aware and had been aware there was an issue as to who had jurisdiction for the custody placement of the minor child. Harold Schildt is a member of the Blackfeet Indian Tribe located in Browning, Montana. Under the Indian Child Welfare Act there was an undecided question where the

Blackfeet Tribal Court had jurisdiction or the Eighth District Court.

After contacting Harry Souvall at his home, being told not to worry about visitation, Harold Schildt thought it was o.k. to visit his family in Browning, Montana, for the Christmas holidays. While there he was going to contact the Blackfeet Tribal Court and determine if the jurisdiction of custody could be decided.

While in Browning, Montana, Harry Souvall told the Uintah County Deputy Sheriff, John Laursen to draft an Affidavit of Probable Cause for Custodial Interference. After the affidavit had been drafted, Harry Souvall filed an Information with the Eighth District Court alleging custodial interference by Harold Schildt and obtained a warrant for his arrest.

Harry Souvall then contacted the FBI asking for help in arresting Harold Schildt on the Blackfeet Indian Reservation.

FBI Special Agent Robert Carlson drafted a criminal complaint filed for a warrant of arrest under Title 18 § 1073 on Harold Schildt as a fugitive from justice. FBI Special Agent Robert Carlson then swore before the United States Magistrate that Harold Schildt had unlawfully fled from Utah to avoid prosecution.

Harold Schildt was arrested on the Blackfeet Indian Reservation, taken to the United States District Court in Browning, Montana where the Federal Magistrate stated Harold Schildt was not a fugitive from justice and the U.S. Attorney immediately dismissed the charges. However, because of the Information and warrant for arrest filed in Utah, Harold Schildt was not released from jail. Harold Schildt was promised that if he would immediately sign a Waiver for Extradition he would

quickly be returned to Utah. Harold signed the Waiver and spent the next 37 days in jail awaiting to be returned to Utah.

Upon arrival in Utah the court after a hearing dismissed the charges of custodial interference because the Information was defective and gave Harry Souvall the chance to amend the Information. Harry Souvall declined to do so.

When Harold Schildt was arrested on the Blackfeet Reservation the child was taken from him by the Indian Child Welfare Act Director and the child was immediately sent to Utah where Treena Schildt was immediately given custody.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve several conflicts:

The conflict between the Tenth Circuit Court of Appeals affirmance of the District Court's premature judgment of dismissal on the grounds of immunity, for all respondents. The dismissal precluded petitioner an opportunity to establish a personal claim of liability under Title 42 U.S.C. § 1983 to enforce provisions against state officers who carry a badge of authority and represent it in some manner whether they act in accordance with their authority or misuse it.

The conflict between the Tenth Circuit Court of Appeal's rationale for affirming the dismissal of the premature judgment. Said rationale was in clear conflict with a rule of law decided by the Utah State Supreme Court. The violation of the rule of law gave rise to the Section 1983 action by petitioner.

The conflict between absolute immunity and personal liability. *Pierson v. Ray,* 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) held that prosecuting attorneys are entitled to absolute immunity for initiating a prosecution and prosecuting the state's cases.

Hafer v. Melo decided by this Court in 1991 held that state officers may be held personally liable for damages under Section 1983 based upon their actions taken in their official capacity.

The Tenth Circuit Court of Appeals rationalized in their affirmance of the District Court's judgment of dismissal on the grounds of immunity that the orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings. That if a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, he must promptly comply with the order pending an appeal. That Harold Schildt cannot now argue that he was free to disobey the order until it had been reduced to writing.

Harold Schildt did not argue he was free to disobey the order, he argued the order was not enforceable because the Utah State Supreme Court ruled in the case of *Wisden v. City of Salina,* 696 P.2d 1205 (Utah 1985) that orders by the court are not enforceable or appealable until reduced to writing, signed by the judge and entered by the clerk.

The Court should grant the writ in order to resolve a split between the Federal Circuit Court of Appeals whether a plaintiff must be specific in his pleadings that he is suing the defendants in a personal capacity or a professional capacity. Some circuits look to the proceedings below to determine whether certain plaintiffs brought their claims against defendants in a professional or personal capacity. Others impose a more rigid pleading requirement.

These various decisions leaves the question as to how one is to pursue a remedy for the violation of his civil rights under

Title 42 U.S.C. § 1983. Must one plead specifically whether he is suing defendants in a personal or professional capacity. May the courts look to the pleadings and determine the answer. If the plaintiff is suing professionally then immunity applies; if not then immunity does not apply. Either one creates more problems than it cures. Are the courts going to require form over substance. Should the plaintiff be entitled to undergo discovery and present evidence to establish a claim of personal liability before immunity is granted to the defendants and the case is dismissed out of hand. Should the courts disregard specific pleadings and look to the evidence and discovery presented before making a decision and then who is dismissed and who is not. It appears that immunity only protects the government entity from being sued for money. Definitive guidelines need to be set down. In this case plaintiff spent 37 days in jail because he was prosecuted for a crime he did not commit by a prosecutor who violated a rule of law and is without a remedy unless this Court resolves the conflicts.

I.

WHERE THE UNITED STATES DISTRICT COURT ACTED PREMATURELY AND ERRONEOUSLY WHEN IT ENTERED ITS JUDGMENT OF DISMISSAL PRECLUDED ANY OPPORTUNITY, BY SUBSEQUENT PROOF, TO ESTABLISH A CLAIM UNDER TITLE 42 U.S.C. § 1983 THAT ALLOWS A STATE OFFICIAL TO BE HELD PERSONALLY LIABLE FOR DAMAGES BASED UPON ACTIONS TAKEN IN HIS OFFICIAL CAPACITY.

When Harold Schildt traveled to Browning, Montana, during the Christmas holidays of 1992 he was not in violation of any enforceable court order issued by the Eighth District Court, State of Utah which would cause him to commit the crime of custodial interference subjecting him to be arrested on federal charges of

flight to avoid prosecution. Utah case law, Utah Rules of Civil Procedure and the Code of Judicial Administration requires any order or judgment to be signed by the judge and filed by the clerk of the court before the order can be enforced or appealed. *Wisden v. City of Salina,* 696 P.2d 1205 (Utah 1985).

Harold Schildt had been awarded temporary physical custody of the minor child on November 3, 1992. However, he could not obtain that custody until Treena Schildt was arrested for custodial interference on December 3, 1992. At that time the minor child was handed over to Harold Schildt.

On December 4, 1992 the court held a hearing in the matter of Treena Schildt's arrest. Harold Schildt was not in attendance at that hearing. Judge, A.L. Payne modified the temporary custody order of November 3, 1992 restricting Harold Schildt from removing the minor child. The November 3, 1992 custody order did not provide for any visitation by Treena Schildt.

Harry Souvall was instructed to prepare the modified order for the courts signature. An instruction Harry Souvall never carried out.

On December 6, 1992, Harold Schildt's mother received a telephone call from the court instructing her to tell Harold Schildt the judge wants him in court on December 7, 1992. Harold Schildt appeared in court and was informed by Judge, A.L. Payne that on December 4, 1992 he had modified Harold's custody order in that he could not remove the child from the state. Further, he was that day to immediately go to Social Services and arrange supervised visitation for Treena Schildt. Harold did so but Social Services would not arrange the supervised visitation without a formal written order from the court. The December 7, 1992 court hearing had concluded without the court assigning anyone to prepare a written order.

Harold unsuccessfully tried to obtain the modified order through Harry Souvall's office. He was unable to speak with Harry Souvall at his office. He was able to get Harry Souvall's home telephone number and called him at home. During the conversation Harold told Harry Souvall he needed the modified order so he could arrange supervised visitation for Treena Schildt. In the meantime what about visitation? Harry Souvall told Harold Schildt not to worry about visitation.

Based upon this conversation with Harry Souvall, Harold Schildt thought it was o.k. to take the minor child to Browning, Montana, for the Christmas holidays to visit family and contact the Blackfeet Tribal Court to determine the jurisdictional question of custody.

Harry Souval knew there was no legally enforceable order preventing Harold Schildt from removing the minor child from the state just as he knew there was no legally enforceable visitation order for Treena Schildt. But that did not stop him from ordering Uintah County Deputy Sheriff John Laursen to prepare an Affidavit of Probable Cause.

Harry Souvall as a prosecuting attorney is entitled to absolute immunity for his conduct in initiating a prosecution and prosecuting the states case. *Austin v. Borel,* 830 F.2d 1356 (C.A. 5 (LA) 1987). However, prosecuting attorneys do not have absolute immunity in giving advise to police officers or for investigative and administrative functions. *Benavides v. Gunnall,* 722 F.2d 615 (1983); *Burns v. Reed,* No. 89-1715 (1991); *Pierson v. Ray,* 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

Harry Souvall's actions were outside his prosecutorial duties and took upon himself duties that were administrative, investigative, and advisory in nature. Harry Souvall provided the FBI with false information when he asked them to help him

find Harold Schildt on the Blackfeet Reservation. This false information caused Harold Schildt to be wrongfully arrested and incarcerated for 37 days. Harry Souvall's conduct clearly violated established constitutional rights which a reasonable person would have known. *Gibson v. Rich,* 44 F.3d 274 (C.A. 5 (Tex.) 1995).

Harry Souvall's actions were such that he can be personally liable for damages under Title 42 U.S.C. § 1983 based upon actions taken in their official capacities. *Hafer v. Melo, et al.,* No. 96-681 (1991). Congress enacted Section 1983 to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of state and represent it in some capacity, whether they act in accordance with their authority or misuse it. *Scheuer v. Rhodes,* 416 U.S. 232, 243 (1974).

Uintah County Deputy Sheriff John Laursen violated normal police procedure when he arbitrarily responded to satisfy and comply with Harry Souvall's directive to draft an affidavit of probable cause.

Normal police procedure required for filing a complaint for criminal prosecutor requires a victim to come forward and complain. A law enforcement officer then conducts an investigation to determine if the elements of the crime have been committed by the suspect to warrant an arrest and prosecution. The law enforcement officer then screens the result of his investigation with the prosecuting attorney who then makes a legal determination if there is probable cause to arrest and prosecute. The prosecuting attorney then files an "Information" with the court and commences prosecution.

Here we have a total violation of proper police procedure by John Laursen to satisfy Harry Souvall's wishes. Harry Souvall acted as the complainant by directing John Laursen to draft the

affidavit of probable cause. John Laursen does a cursory investigation never contacting Treena Schildt for a formal complaint, who would have been the victim, but she didn't have a legal enforceable right of visitation because of Harry Souvall's failure to prepare a formal written order signed by the judge. Nor does John Laursen determine if there is an enforceable court order on which to make a complaint. In additioin, Harold Schildt was not a fugitive from justice. There were no charges pending.

Harry Souvall then screens the Probable Cause Affidavit and determines on his own complaint there is probable cause to file an Information and charge Harold Schildt with a crime that is legally impossible for him to commit because there was no legally enforceable order in place due to the failure of Harry Souvall to draft the order for the judges signature.

John Laursen's actions or lack of actions clearly violates proper police procedure and violates established constitutional rights of Harold Schildt which he as a reasonable law enforcement officer should have known. As such he may be held personally liable for damages under Title 42 U.S.C. § 1983 based upon actions taken in his official capacity. *Hafer v. Melo, supra.*

Nor do we need to show that it was his specific intent to harmfully wrong Harold Schildt. We only need to show that he did not in the light of all the circumstances act in good faith. *Wood v. Strickland,* 420 U.S. 308, 95 S. Ct. 882, 43 L. Ed. 2d 214 (1975).

John Laursen's qualified immunity is related to facts as yet established either by affidavits, admissions or trial record and should not have been dismissed because of qualified immunity.

Robert M. Carlson should not have been dismissed on the basis of qualified immunity. The FBI took a cavalier approach

to Harry Souvall's request for help. Robert M. Carlson never gave the documents presented by Harry Souvall more than a quick look before he went before the U.S. Magistrate and obtained a warrant for the arrest of Harold Schildt as a fugitive from justice, fleeing to avoid prosecution pursuant to Title 18 U.S.C. § 1073.

The footnotes state this section is specifically designed to be used for parental kidnapping and flight to avoid felony prosecution. Had Robert Carlson looked a little closer he would have known Harold Schildt was not guilty of the crime he was charged with. Harold Schildt had legal custody and the Probable Cause Affidavit did not show he had the intent to remain out of state, or that he was in violation of an order. Which under Utah law, on the first offense is no more than contempt of court. Even though there is supposed to be a spirit of cooperation between the FBI and local law enforcement. Even though it would be a horrendous job to investigate the underlying charges of every agency who asks for help from the FBI, Robert M. Carlson had a duty to notice the differences between Title 18 U.S.C. § 1073 and U.C.A. 76-5-503. Robert Carlson had a duty to see that the charge was correct by asking for a copy of the courts order preventing Harold Schildt from leaving the state. To do any less he exposes himself and the FBI to civil liability, which he did.

Is it a defense when someone's liberty is taken away for 37 days to say I'm not responsible for violating Harold Schildt's civil rights because the FBI has a spirit of cooperation with local law enforcement. It is not my fault after all when Harold Schildt was taken before the federal magistrate in Browning, Montana and the magistrate pointed out Harold Schildt could not be a fugitive from justice and the U.S. Attorney dropped the charges against him but we are not responsible because I have qualified immunity. I think not!

Robert M. Carlson should not be dismissed as a defendant because of qualified immunity. He did not act in a reasonable manner and as a trained FBI agent he is a reasonably competent public official and he should know the law governing his conduct and not place either himself or the FBI in jeopardy of civil liability. He can be held personally liable for his actions in his official capacity as an FBI agent under Title 42 U.S.C. § 1983.

II.

WHEN A STATE OFFICIAL VIOLATES A RULE OF LAW THAT WOULD PREVENT PROSECUTION AND PROSECUTES, DOES HIS ACTION FALL WITHIN THE SCOPE OF HIS IMMUNITY.

A prosecuting attorney is entitled to absolute immunity for his conduct in initiating a prosecution and prosecuting the states case. *Austin v. Borel, supra; Benavades v. Gunnall, supra; Burns v. Reed, supra* and *Pierson v. Ray, supra,* state the immunity is not absolute when the prosecutor is giving advise to police officers or for investigative and administrative functions. Where does the immunity fall when the prosecutor is assigned by the court to reduce the court's order to writing for the judge's signature and entry by the clerk. The prosecutor fails to reduce the order to writing even at the insistence of the one who the order is directed to so he can comply with the court's order to arrange for supervised visitation and cannot do so without the written order. The prosecutor then tells him not to worry about visitation which is contrary to the court's order. Even though there is a rule of law that says a court order cannot be enforced or appealed unless the order is reduced to writing, signed by the judge and entered by the clerk and the prosecutor prosecutes on the order alleging custodial interference when the defendant leaves the state. Then has the defendant arrested by the FBI as a fugitive from justice. I would argue that this action by the

prosecutor does not fall within the scope of his immunity. This type of action is not prosecuting the states case and therefore not entitled to absolute immunity.

III.

WHETHER THE PLAINTIFF MUST BE SPECIFIC IN HIS PLEADINGS THAT HE IS SUING THE DEFENDANTS IN A PERSONAL CAPACITY OR A PROFESSIONAL CAPACITY.

The federal circuits are split whether a plaintiff must specifically plead that he is suing a state official in his personal capacity or his professional capacity. The Third Circuit looks to the pleadings below to determine if the claims for damages against Hafer in her official capacity or her personal capacity. Other Courts of Appeal adhere to this practice. Still others impose a more rigid pleading requirement. *Hafer v. Melo,* No. 90-681 (1991), footnote, page 2.

Pleading specifically makes the question more clear. However if one pleads professionally then immunity applies or if one pleads personally then immunity does not apply. Are the courts going to require form over substance? If one pleads professionally and immunity applies then the plaintiff is foreclosed from suing personally unless he does not have a statute of limitations problem. If discovery and the presentation of evidence clearly shows there is a violation of civil rights then the court should not require a specific pleading as long as there is indication in the pleadings that the defendants are to be held personally liable. Immunity appears to protect only the government entity from money damages. I believe the better rule would be to allow discovery and the presentation of evidence before the court decides immunity is a defense and allow the litigation to go forward on a personal liability if appropriate.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL A. STANTON
Counsel of Record
Attorney for Petitioner
352 South Denver Street, #226
Salt Lake City, Utah 84111
(801) 328-8230

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MAY 9, 1997

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 96-4114, 96-4149
(D.C. No. 93-CV-1082)
(D. Utah)

HAROLD ALVIN SCHILDT,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; UTAH STATE DEPARTMENT OF SOCIAL SERVICES; MONTANA STATE SOCIAL SERVICES, GLACIER COUNTY; FRANCIS ONSTAD, Blackfeet ICWA Director; ROBERT M. CARLSON; HARRY SOUVALL, 8th District Prosecutor; JOHN LAURSEN, Uintah County Sheriff Deputy; UINTAH COUNTY SHERIFF'S DEPARTMENT,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before BRORBY, BARRETT, and LUCERO, Circuit Judges.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

Plaintiff Harold Alvin Schildt appeals the order of the district court granting summary judgment to all defendants on plaintiff's claims brought pursuant to 42 U.S.C. § 1983. Because we agree with the district court that all defendants in this action were entitled to immunity or were otherwise appropriately dismissed, we affirm.[1]

Plaintiff and his former wife were engaged in a custody dispute involving their daughter, Sammi. On November 3, 1992, a Utah state court awarded temporary physical custody of Sammi to plaintiff. When, by December 3, 1992, the child's mother had not relinquished custody, the mother was arrested. At a hearing following the mother's arrest, the court modified the November 3 custody order to prohibit plaintiff from removing Sammi from the state of Utah and to provide for visitation for the mother. Plaintiff's attorney was present at this hearing.

A few days later, plaintiff himself appeared before the court and was orally informed by the judge of the modification of the custody order preventing him from removing Sammi from Utah. Neither this order nor the November 3 order had been reduced to written form when, shortly before Christmas, plaintiff took his daughter to visit his family in Browning, Montana.

Upon learning that plaintiff had taken his daughter out of the State of Utah. Harry Souvall, the county prosecutor for Uintah County, Utah, instructed the county sheriff, John Laursen, to draft an affidavit of probable cause for custodial interference. Sheriff Laursen did so after conducting an investigation of the

---

1. After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

matter. Mr. Souvall then obtained a warrant for plaintiff's arrest and contacted the FBI for help in arresting plaintiff, who by then was on the Blackfeet Indian Reservation in Montana. An FBI agent, Robert Carlson, secured a warrant for plaintiff's arrest under 18 U.S.C. § 1073.[2] Plaintiff was arrested and returned to Browning, Montana, where a federal magistrate judge determined that plaintiff was not a fugitive from justice. The federal charges against plaintiff were dismissed, but he spent thirty-seven days in jail in Montana awaiting his return to Utah. Once in Utah, the charges pending there against plaintiff were also dismissed because of a defect in the information.

Plaintiff brought this action under § 1983 alleging that his civil rights had been violated by various defendants including county attorney Souvall, Sheriff Laursen, the Sheriff's Department of Uintah County, the FBI, and FBI agent Carlson. The district court determined that Mr. Souvall was absolutely immune from prosecution because he had been acting within the scope of his prosecutorial duties. Sheriff Laursen was later granted qualified immunity, and the Sheriff's Department was dismissed. With regard to the latter, the court held that no factual allegations had been made against the Sheriff's Department per se, and that no respondeat superior liability would lie against the department. Finally, agent Carlson was granted qualified immunity, and the FBI was also dismissed.

---

2. 18 U.S.C. § 1073 provides, in pertinent part:

> Whoever moves or travels in interstate or foreign commerce with intent . . . to avoid prosecution . . . under the laws of the place from which he flees, for a crime . . . which is a felony under the laws of the place from which the fugitive flees . . . shall be fined under this title or imprisoned not more than five years, or both.

Appendix A

On appeal, plaintiff argues that the district court prematurely dismissed his claims, thereby precluding his ability to establish defendants' liability under § 1983.[3] We disagree.

At the heart of plaintiff's lawsuit is his theory that an oral order from a court of competent jurisdiction is, somehow legally ineffective until it is reduced to writing, thus making defendants' efforts at enforcing the order against him wrongful. Under the circumstances presented here, this is incorrect. As the Supreme Court has noted,

> [t]he orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This principle is especially applicable to orders issued during trial.

Maness v. Meyers, 419 U.S. 449, 459 (1975) (quotation and citation omitted). Because plaintiff's attorney was present when the court initially modified the custody order to prohibit the removal of Sammi from Utah, and because plaintiff himself was present when the court later reiterated this restriction, he cannot now argue that he was free to disobey the order until it had been reduced to writing. As the Supreme Court has instructed:

> If a person to whom a court directs an order believes that order is incorrect the remedy is

---

3. Plaintiff filed a premature appeal in this matter, case No. 96-4114. That appeal has been consolidated with case No. 96-4149.

> to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Id., at 458.

The fact that the court's order in this case was oral does not diminish its force. We recognize that the eventual entry on a docket of a written order is important for many procedural reasons, not the least of which is to determine when, for purposes of appellate review, there is a final appealable judgment. *See* Fed. R. Civ. P. 58; Fed. R. App. P. 4. Plaintiff, however, did not appeal the court's order or attempt any other judicial remedy that may have depended on the existence of a written order.

We view the court's order as akin to the grant of a temporary restraining order or a preliminary injunction, the purpose of which is to prohibit specific actions. *See Bethlehem Mines Corp. v. United Mine Workers,* 476 F.2d 860, 862-64 (3d Cir. 1973) (affirming a finding of contempt against a party which had disobeyed an orally entered temporary restraining order); *see also In re LaMarre,* 494 F.2d 753, 758 (6th Cir. 1974) (noting that an order "entered in open court in the presence of the person concerned or with his knowledge clearly proved" can be enforced by criminal contempt proceedings). While there may be instances in which an oral order should not be enforceable until reduced to writing, this case is not one of them. "[T]his case involves an order that forbids certain actions rather than one that allows those actions. The former is meaningless if of no effect until written." *In re Nail,* 195 B.R. 922, 930 (Bankr.

N.D. Ala. 1996). Plaintiff's argument that defendants all acted illegally because they proceeded without the auspices of an enforceable order, therefore, is without merit.

As noted above, the district court determined that county attorney Souvall was entitled to absolute immunity because his involvement in this case was in his role as a prosecutor exercising his prosecutorial duties. "Absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Roberts v. Kling*, 104 F.3d 316, 318 (10th Cir. 1997), *petition for cert. filed*, (U.S. April 1, 1997) (No. 96-1602) (quotation and citation omitted). Plaintiff's complaint charged that Mr. Souvall "had Uintah County Deputy Sheriff, John Laursen draft an Affidavit of Probable Cause," Appellant's App. at 18, and that he eventually charged plaintiff with the third degree felony of custodial interference. Plaintiff also alleged that Mr. Souvall violated his constitutional rights by contacting the FBI for help in apprehending him.

This court has recently examined the issue of absolute immunity in a prosecutorial setting where the defendant was an investigator in a district attorney's office. *See Roberts*, 104 F.3d at 318. There, we concluded that the defendant's actions in swearing out a complaint and obtaining an arrest warrant were prosecutorial in nature, as part of the initiation of a judicial proceeding, and thus deserving of absolute immunity. *See id.* at 319-20. Defendant Souvall's actions in this case in directing the Uintah County Sheriff's Department to investigate rumors relative to plaintiff's whereabouts was simply an attempt to establish the probable cause necessary before a criminal complaint could be filed. Once the facts reported to defendant Souvall were verified by the Sheriff's Department, it was incumbent upon him to charge plaintiff and to take steps to secure

his appearance. Defendant's acts of verifying probable cause and ultimately filing a complaint were clearly a part of the initiation of prosecution, *see Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), and thus deserving of absolute immunity, *see Roberts*, 104 F.3d at 319-20.

As mentioned above, the district court granted qualified immunity to Sheriff Laursen.

> We review *de novo* the district court's grant of qualified immunity on summary judgment, viewing the evidence in the light most favorable to the nonmoving party. We analyze assertions of qualified immunity under a two-part framework: first we determine whether the plaintiff has asserted a violation of a constitutional or statutory right, and then we decide whether that right was clearly established such that a reasonable person in the defendant's position would have known that [his or] her conduct violated the right. The plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity. Once the plaintiffs have met this initial burden, the defendant must demonstrate that no material issues of fact remain as to whether his or her actions were objectively reasonable in light of the law and the information he or she possessed at the time. If we determine that plaintiffs have failed to show the officers' conduct constituted a violation of a constitutional or

> statutory right, we need not address the other elements of the qualified immunity inquiry.

Davis v. Gracey, No. 95-6245, 1997 WL 192018, slip op at *3 (10th Cir. Apr. 21, 1997) (quotations and citations omitted). As long as a defendant pleads it as an affirmative defense, qualified immunity acts as a shield for defendant from the burdens of discovery and trial as well as for liability. *See Mitchell v. Maynard*, 80 F.3d 1433, 1447 (10th Cir. 1996).

Plaintiff's complaint alleged only that Sheriff Laursen's probable cause affidavit "was fatally defective because it did not articulate facts that alleged the elements of Custodial Interference." Appellant's App. at 20. Nothing in the complaint implicates the Uintah County Sheriff's Department. Under these circumstances, we agree with the district court that plaintiff has not stated a claim that can overcome Sheriff Laursen's qualified immunity and has not stated a claim at all against the Sheriff's Department.

Plaintiff did not contest the veracity of Sheriff Laursen's affidavit. *See id.* at 44. In order to establish that Sheriff Laursen violated his due process rights, plaintiff would have to prove that the affidavit filed by the Sheriff was untruthful. *See St. John v. Justmann*, 771 F.2d 445, 448 (10th Cir. 1985). Because plaintiff concedes that the facts in the affidavit were true, he cannot show that Sheriff Laursen's conduct constituted a violation of a constitutional right. Sheriff Laursen is thus entitled to qualified immunity. *See Davis*, 1997 WL 192018, at *3. Because we agree with the district court that Sheriff Laursen committed no constitutional violation, and because plaintiff alleged no specific claims implicating the Uintah County Sheriff's Department, the claim against the department was also

properly dismissed. *See Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir.), *cert. denied*, 117 S. Ct. 186 (1996).[4]

Finally, we also affirm the dismissal of the FBI and its agent, Robert Carlson. When county attorney Souvall wrote to the FBI requesting help in apprehending plaintiff, he included in his correspondence a copy of the information, the warrant of arrest, the affidavit of probable cause, and a petition filed in juvenile court for custody of plaintiff's daughter to social services. *See* Appellant's App. at 33. The arrest warrant charged plaintiff with custodial interference, a third degree felony; plaintiff does not argue that the warrant appeared facially invalid.

As the district court noted, "[g]overnment officials, including FBI agents, are protected by the defense of qualified immunity for civil liability for objectively reasonable official actions." *Id.* at 46 (citing *Anderson v. Creighton*, 483 U.S. 635, 636 (1987)). Plaintiff has pointed to no authority establishing his right to have the FBI re-investigate and verify the facts underlying state process before proceeding under 18 U.S.C. § 1073. Even if plaintiff has identified a more general constitutional right to be free from false arrest, however, Agent Carlson would not lose his qualified immunity unless it was clear that, on an objective basis,

> no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could

---

4. On appeal, plaintiff discards his argument based on the allegedly defective probable cause affidavit and, instead, argues that Sheriff Laursen violated plaintiff's constitutional rights by allowing Mr. Souvall, the county attorney, to act as the complainant. Even if we could determine that this argument had been raised in the district court, we would reject it as meritless.

> disagree on this issue, immunity should be recognized.
>
> . . . .
>
> Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost.

Malley v. Briggs, 475 U.S. 335, 341, 344-45 (1986). We agree with the district court that Agent Carlson was entitled to rely on the documentation he received from the Utah county attorney for purposes of 18 U.S.C. § 1073. Because Agent Carlson committed no constitutional violation, and because plaintiff made no specific charges in his complaint against the FBI, the latter was also appropriately dismissed as a defendant.

AFFIRMED.

Entered for the Court

Carlos F. Lucero
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DIVISION, DISTRICT OF UTAH FILED AUGUST 15, 1996

DANIEL A. STANTON (3077)
ARON STANTON, P.C.
Attorney for Plaintiff
352 South Denver Street, #226
Salt Lake City, Utah 84111
Telephone: (801) 328-8230

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DIVISION OF UTAH

Case No. 93-C-1082B

HAROLD ALVIN SCHILDT,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, SALT LAKE CITY OFFICE, et al.,

Defendants.

ORDER

Judge Dee Benson

On May 14, 1996, the Court entered an Order dismissing the last Defendants in the above-entitled case.

Appendix B

On June 24, 1996, Plaintiff filed a Notice of Appeal.

Before the Court, is a Motion for Entry of Judgment of Dismissal of the above-entitled case and other related matters. Having reviewed the Motion and its grounds, the file, being fully apprised, and for good cause appearing, the Court makes the following:

Based on the foregoing, IT IS HEREBY ORDERED that Motion for Entry of Judgment of Dismissal of the above-entitled case is GRANTED. IT IS FURTHER ORDERED that Plaintiff's Notice of Appeal falls under Rule 4(2) of the Federal Rules of Appellate Procedure and Plaintiff's Notice of Appeal will be treated as filed on the date of and after the entry of this Order as a Notice of Appeal from the Judgment of Dismissal.

DATED this 14th day of August, 1996

s/ Dee Benson
Dee Benson
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED MAY 8, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 93-C-1082 B

HAROLD ALVIN SCHILDT,

Plaintiffs,

vs.

FEDERAL BUREAU OF INVESTIGATION SALT LAKE CITY OFFICE; FBI SPECIAL AGENT, ROBERT M. CARLSON; UINTAH–COUNTY; UINTAH COUNTY SHERIFF'S DEPARTMENT; UINTAH COUNTY SHERIFF DEPUTY, JOHN LAURSEN,

Defendants.

This case is before the court on Defendant Robert M. Carlson's Motions to Dismiss and for Summary Judgment. The Plaintiff brought this action pursuant to 42 U.S.C. §§ 1983 & 1985, alleging that Carlson, an FBI Special Agent, "acting under the color of federal and state law," drafted a criminal complaint alleging that the Plaintiff fled Utah to avoid prosecution and that Defendant Carlson should have known that the Information on which his complaint was based was "fatally defective."

Having reviewed the Amended Complaint and the parties' submissions, being fully apprised, and for good cause, the court makes the following findings and enters the following Order.

Appendix C

Government officials, including FBI agents, are protected by the defense of qualified immunity for civil liability for objectively reasonable official actions. *Anderson v. Creighton,* 483 U.S. 635, 636 (1987). The relevant question is whether a reasonable agent could have believed his actions were lawful in light of clearly established law and information the agent possessed. *Id.* at 637. Qualified immunity is a bar to suit, and is not simply a defense to liability. *Bisbee v. Bey,* 39 F.3d 1096, 1099 (10th Cir. 1994). Plaintiff makes two allegations against Agent Carlson. First, Plaintiff alleges that Carlson drafted a criminal complaint for violation of 18 U.S.C. § 1073 based on a letter from the Uintah County Attorney asking for help in apprehending the Plaintiff. This letter alleged that the Plaintiff was a felon who had crossed state lines to avoid prosecution. (Amended Complaint, Page 23, EXHIBIT #2) Plaintiff alleges that Carlson examined certified copies of the State process and should have known that the Plaintiff was not a fugitive from justice (Amended Complaint, Para. 37-38) Plaintiff's allegations are not sufficient to overcome the defense of qualified immunity. Furthermore, the purpose of 18 U.S.C. § 1073 is to "increase the instances in which federal law enforcement officials would assist local law enforcement officals." *United States v. Frank,* 864 F.2d 992, 998 (3rd Cir, 1989), *cert denied,* 490 U.S. 1095 (1989). Requiring the FBI to independently investigate the underlying complaint in a § 1073 action would unduly burden the FBI and would undermine the statute's intended goal of federal and state agency cooperation in the apprehension of criminals. An FBI Agent such as Carlson must be able to rely on the information provided by state officials for purposes of § 1073 actions. Because Plaintiff does not allege any conduct by Agent Carlson that would violate "clearly established" constitutional rights. Agent Carlson is properly dismissed from this suit.

Appendix C

Defendant Carlson also presents various other arguments in support of his dismissal from this case, including: Plaintiff's failure to effect proper and timely service; the inapplicability of § 1983, to federal officers acting under color of federal law; the existence of probable cause for the arrest warrant; and that tort claims against Federal Officers must be brought under the Federal Tort Claims Act and within the appropriate statute of limitations. Because this court finds that qualified immunity is fully dispositive of the case, it does not reach these other likely meritorious defenses.

Furthermore, because Agent Carlson is dismissed from this action, the court finds that the FBI must also dismissed. The FBI can only be found liable to the Plaintiff through the actions of Agent Carlson.

Finally, the Amended Complaint and subsequent memoranda continue to refer to the Uintah County She.iff's Department and Deputy John Laursen as defendants. These parties have previously been dismissed from this action by Order of this Court. Further reference to these parties as defendants is inappropriate.

Based on the foregoing, IT IS HEREBY ORDERED that the Motion to Dismiss the Amended Complaint [file #36] is GRANTED as to Defendant Carlson and as to the Defendant Federal Bureau of Investigation.

Dated this 8th day of May, 1996

s/ Dee Benson
Dee Benson
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED FEBRUARY 6, 1995

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH — CENTRAL DIVISION

Civil No. 93-C-1082B

HAROLD ALVIN SCHILDT,

Plaintiff,

vs.

UINTAH COUNTY SHERIFF DEPUTY JOHN LARSEN; FEDERAL BUREAU OF INVESTIGATION SALT LAKE CITY; MONTANA STATE SOCIAL SERVICES, GLACIER COUNTY; BLACKFEET I.C.W.A. DIRECTOR FRANCIS ONSTAD,

Defendants.

ORDER

On September 20, 1994, this Court dismissed defendants A.L. Payne, Myrna Galbreath and Harry Souvall from this suit on the basis of absolute immunity. The Court deferred ruling on Defendant John Laursen's motion to dismiss because the defense he raised, qualified immunity, is an affirmative defense related to facts that had not yet been pleaded. The Court allowed Plaintiff the opportunity to file an amended complaint. Plaintiff later filed an amended complaint adding the Uintah County Sheriff's Department and inappropriately including the names of the parties that have been dismissed.

Appendix D

Before the Court is a Motion to Dismiss Amended Complaint and For an Award of Attorney's Fees brought by Defendants John Laursen and the Uintah County Sheriffs Department. Having reviewed the Amended Complaint and the memoranda submitted by the parties, being fully apprised, and for good cause appearing, the court makes the following findings and enters the following Order.

Government officials, including police officers, are protected by the defense of qualified immunity under 42 U.S.C. § 1983 unless the official's conduct violated " 'clearly established, statutory or constitutional rights of which a reasonable person would have known.' " *England v. Hendricks*, 880 F.2d 281, 283 (10th Cir. 1989) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). *See Maxey ex rel. Maxey v. Fulton*, 890 F.2d 279, 282-83 (10th Cir. 1989) (recognizing that qualified immunity is not necessarily entitlement to immunity from discovery); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (upholding decision in *Maxey ex rel. Maxey v. Fulton*). Plaintiff's sole allegation against Laursen — that Laursen drafted an affidavit of probable cause which was fatally defective because it did not articulate facts that alleged the elements of Custodial Interference (Amended Complaint, ¶ 33) — is not sufficient to overcome the defense of qualified immunity. Plaintiff specifically states that he is not contesting the veracity of Laursen's affidavit. (Memo in Opposition, p. 3.) Laursen's alleged conduct falls squarely within the protection of qualified immunity. *See Daniels v. Williams*, 474 U.S. 327, 328 (1986); *St. John v. Justman*, 771 F.2d 445, 448 (10th Cir. 1985). Consequently, Laursen is properly dismissed from this suit.

The Amended Complaint makes no factual allegations whatsoever concerning the Uintah County Sheriff's Department.

Appendix D

A plaintiff cannot base a civil rights claim against a sheriff's department solely upon a theory of *respondent superior. See Reimer v. Smith,* 663 F.2d 1316, 1323 (5th Cir. 1981). Consequently, the Uintah County Sheriffs Department is properly dismissed from this suit.

Based on the foregoing, IT IS HEREBY ORDERED that the Motion to Dismiss the Amended Complaint [file # 26] is GRANTED as to defendants John Laursen and the Uintah County Sheriff's Department. IT IS FURTHER ORDERED that the Motion for Attorney's Fees is DENIED.

Dated this 6th day of February, 1995.

s/ Dee Benson
Dee Benson
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION FILED SEPTEMBER 21, 1994

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH — CENTRAL DIVISION

Civil No. 93-C-1082B

HAROLD ALVIN SCHILDT,

Plaintiff,

vs.

8TH DISTRICT COURT JUDGE A.L. PAYNE; 8TH DISTRICT PROSECUTOR HARRY SOUVALL; UINTAH COUNTY SHERIFF DEPUTY JOHN LAURSEN; FEDERAL BUREAU OF INVESTIGATION SALT LAKE CITY; UTAH STATE SOCIAL SERVICES, DUCHESNE COUNTY; MONTANA STATE SOCIAL SERVICES, GLACIER COUNTY; BLACKFEET TRIBAL COURT JUDGE MYRNA GALBREATH; BLACKFEET I.C.W.A. DIRECTOR FRANCIS ONSTAD,

Defendants.

Order

Plaintiff Harold Alvin Schildt ("Schildt"), appearing pro se, brought this action against defendants 8th District Court Judge A.L. Payne; 8th District Prosecutor Harry Souvall; Uintah County Sheriff Deputy John Laursen; Federal Bureau of Investigation Salt Lake City; Utah State Social Services, Duchesne County; Montana State Social Services, Glacier County; Blackfeet Tribal Court Judge Myrna Galbreath; and

Appendix E

Blackfeet I.C.W.A. Director Francis Onstad for civil rights violations under 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Defendants Harry Souvall and John Laursen moved to dismiss the complaint against them on January 28, 1994 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On February 7, 1994, Defendant Myrna Galbreath also moved to dismiss the complaint against her pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. After obtaining counsel on July 5, 1994, Schildt filed this Motion to Amend Complaint and Request for Extension of Time on August 19, 1994, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. Defendants Harry Souvall and John Laursen objected to Schildt's motion. Having reviewed the motions and memoranda submitted by the parties, being fully apprised, and for good cause appearing, this Court makes the following findings and enters the following Order.

In cases where justice demands leave to amend should be freely granted. *Gillette v. Tansy,* 17 F.3d 308, 312 (10th Cir. 1994) (citing Fed. R. Civ. P. 15(a)). Initially, Schildt filed his complaint pro se; however, he subsequently requested the assistance of counsel, and the court granted his request. Accordingly, Schildt's suit will be allowed to proceed with the assistance of his appointed counsel.

Defendants A.L. Payne, Myrna Galbreath, and Harry Souvall are absolutely immune from suit. It is well established at common law that absolute immunity applies to judges and prosecutors in the exercise of their judicial and prosecutorial duties. *Imbler v. Pachtman,* 424 U.S. 409, 419-20, 430 (1976). The allegations against Defendants 8th District Court Judge A.L. Payne, Blackfeet Tribal Court Judge Myrna Galbreath, and 8th District Prosecutor Harry Souvall arise from their judicial and prosecutorial functions. Therefore, these defendants are dismissed from this action.

Appendix E

Defendant John Laursen's motion to dismiss is based upon a defense of qualified immunity. Government officials, including police officers, may plead an affirmative defense of qualified immunity under 42 U.S.C. § 1983, and the test is whether the official's conduct violated " 'clearly established, statutory or constitutional rights of which a reasonable person would have known.' " *England v. Hendricks*, 880 F.2d 281, 283 (10th Cir. 1989) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). Because qualified immunity is an affirmative defense related to facts not yet pleaded, the Court cannot properly rule as a matter of law. Consequently, the Court defers judgment on this issue until Schildt is provided an opportunity to file his amended complaint. *See Maxey ex rel. Maxey v. Fulton*, 890 F.2d 279, 282-83 (10th Cir. 1989) (recognizing that qualified immunity is not necessarily entitlement to immunity from discovery); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (upholding decision in *Maxey ex rel. Maxey v. Fulton*). Based on the foregoing,

IT IS HEREBY ORDERED that Plaintiff Schildt's motion to amend is granted with an extension of time for 30 days from the date of this Order. IT IS FURTHER ORDERED that Defendants 8th District Court Judge A.L. Payne, Blackfeet Tribal Court Judge Myrna Galbreath, and 8th District Prosecutor Harry Souvall are dismissed.

Dated this 20th day of September, 1994.

s/ Dee Benson
Dee Benson
United States District Court

APPENDIX F — STATUTES AND RULES INVOLVED

Utah Code Annotated 76-5-303

76-5-303. Custodial interference.

(1) A person, whether a parent or other, is guilty of custodial interference if, without good cause, the actor takes, entices, conceals, or detains a child under the age of 16 from its parent, guardian, or other lawful custodian:

(a) Knowing the actor has no legal right to do so; and

(b) With intent to hold the child for a period substantially longer than the visitation or custody period previously awarded by a court of competent jurisdiction.

(2) A person, whether a parent or other, is guilty of custodial interference if, having actual physical custody of a child under the age of 16 pursuant to a judicial award of any court of competent jurisdiction which grants to another person visitation or custody rights, and without good cause the actor conceals or detains the child with intent to deprive the other person of lawful visitation or custody rights.

(3) Custodial interference is a class A misdemeanor unless the child is removed and

taken from one state to another, in which case it is a felony of the third degree.

18 U.S.C. § 1073

§ 1073. Flight to avoid prosecution or giving testimony

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey is a high misdemeanor under the laws of said State, is charged, or (3) to avoid service of, or contempt proceedings for alleged disobedience of, lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State empowered by the law of such State to conduct investigations of alleged criminal activities, shall be fined not more than $5,000

or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, or in which an avoidance of service of process or a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed, and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

* * *

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * *

Utah Rules of Civil Procedure Rule 58A(b)

Rule 58A. Entry.

* * *

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

* * *

Code of Judicial Administration Rule 4-504

Rule 4-504. Written orders, judgments and decrees. Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended

to change existing law with respect to the enforceability of unwritten agreements.

* * *